Supreme Court, U.S.
FILED
JAN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1159

NO. 88_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

ALEXSANDRO VINCENTE BRAVO,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "fruit of the poisonous tree" doctrine apply to live-witness testimony when the identity of the witness is derived from statements made by the criminal defendant in violation of Miranda v. Arizona, but held to be otherwise voluntary under the Fifth Amendment?

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OPINION BELOW

The Arizona Supreme Court held that statements made by Bravo to police officers were voluntary under the Fifth Amendment. State v. Bravo, 762 P.2d 1318, 1323-25, 17 Ariz.Adv.Rep. 26, 30-31 (1988) (Appendix A at A-21 through A-31). The Arizona Supreme Court found that Bravo invoked his Miranda rights during these voluntary statements. Id. (Appendix A at A-32). The Arizona Supreme Court then held that, pursuant to the "fruit of the poisonous tree" doctrine announced in Wong Sun v. United States, 371 U.S. 471 (1963), the testimony of the witness whose identity was derived from the Miranda violation had to be suppressed. Id. (Appendix A at A-33 through A-57).

JUDGMENT SOUGHT TO BE REVIEWED

Petition for writ of certiorari to the Arizona Supreme Court.

The Arizona Attorney General, on behalf of the State of Arizona, prays that a writ of certiorari issue to review the judgment of the Arizona Supreme Court entered on September 20, 1988.

STATEMENT OF JURISDICTION

Alexsandro Vincente Bravo was charged by indictment in Pima County, Arizona, with one count each of armed robbery, aggravated robbery, and aggravated assault relating to the assault and robbery of Raland Tinker. In a separate indictment, Bravo was charged with one count each of first-degree murder and armed robbery relating to the robbery and death of Shang Ngor Wong. The indictments were consolidated and Bravo was tried and convicted on all counts except the armed robbery count as it related to Shang Ngor Wong. Bravo was sentenced to a term of years.

Bravo appealed his conviction contending statements made by him to police officers were involuntary and the testimony of a witness whose identity was learned from that interview was the fruit of the involuntary confession. The

Arizona Supreme Court held that the statements were voluntary, but held that the testimony of the witness had to be suppressed because the identity of the witness was learned after a Miranda violation. The state filed a timely motion for reconsideration, contending that the "fruit of the poisonous tree" doctrine did not apply to evidence derived from a Miranda violation. (Appendix B.) On November 10, 1988, the Arizona Supreme Court denied the motion for reconsideration. (Appendix C.) This petition for a writ of certiorari is timely filed within 60 days of the Arizona Supreme Court's order denying the state's motion for reconsideration. Petitioner invokes this Court's jurisdiction under U.S. Const. art. III, § 2, 28 U.S.C. § 1254(a), and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment reads as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself, . . .

The pertinent part of the Fourteenth Amendment reads as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On December 12, 1981, Alexsandro Bravo broke into the motel room of Charles Craig at the Desert Inn, located in Tucson, Arizona, and stole Craig's gun. On December 13, 1981, Raland Tinker checked into a motel in Tucson. Later, when Mr. Tinker exited his room, Bravo and Danny Champion encircled Mr. Tinker and ordered him to lie down. Tinker obeyed and removed his wallet from his back pocket and laid it next to his head. Bravo picked up Tinker's wallet and struck Tinker on the head with his gun, causing it to discharge into Tinker. Bravo and Champion fled with Tinker's wallet. After the incident, Tinker was transported to a hospital where the bullet was surgically removed and thereafter preserved for evidence.

On December 14, 1981, Bravo entered a market in Tucson, near Tucson High

School. As Bravo entered, Mrs. Shang Ngor Wong came from the back of the store. Bravo pointed his gun at Mrs. Wong and ordered her to "Put the money in a bag." In response to Bravo's demand, Mrs. Wong nodded her head and began to walk from behind the cash register towards Bravo. Bravo, seeing Mrs. Wong walking towards him and sensing nowhere to run, fired his gun at Mrs. Wong, killing her.

Although the case regarding Mrs. Wong received substantial attention in the Tucson/Pima County area, it remained unsolved for approximately 2-1/2 years. On April 4, 1984, Bravo was arrested in Benson, Arizona, for trying to steal a police car in broad daylight. Bravo was taken to the Cochise County Jail, where Bravo was extremely disoriented and unable to communicate. Due to Bravo's abnormal behavior and disorientation, the

medical staff of the Cochise County Jail ordered that Bravo be placed on Haldol and Symmetrel. On April 11, 1984, the detention personnel gave Bravo the medication prescribed.

On April 17, 1984, Bravo's abnormal behavior ceased. On that date, Bravo summoned a detention officer to his cell. When the officer arrived at Bravo's cell, Bravo indicated that he wanted to tell somebody about a very bad thing that he had done that was bothering his conscience. Bravo then stated, "I killed an old Chinese woman in an armed robbery in Tucson." The officer asked Bravo if he would like to talk with the psychiatric counselor and Bravo said yes. The detention officer escorted Bravo to the counselor's office.

The detention officer informed the psychiatric counselor what Bravo wanted to speak to her about and then placed him

in her office. Bravo stated to the counselor that he needed to confess to a crime. The counselor informed Bravo that he needed to talk with a detective if he wanted to confess to a crime. Bravo stated that he wanted to talk with a detective and the counselor summoned Detective Martinez to her office.

Detective Martinez arrived and the counselor introduced Bravo to the detective. Immediately upon his arrival, Detective Martinez advised Bravo of his Miranda[1] rights. As Detective Martinez read each of the rights required by Miranda, the counselor elaborated to Bravo about the specific nature of the right and how it would apply to Bravo. Bravo waived his rights and stated that, in May 1982, he went into a store close

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1. Miranda v. Arizona, 384 U.S. 436 (1966).

to Tucson High and "shot an elderly lady," possibly oriental. When Bravo finished confessing, Detective Martinez advised Bravo that he was going to call the Tucson Police Department to verify his story. The detective then escorted Bravo back to his cell.

Detective Martinez contacted detectives from the Tucson Police Department and informed them of Bravo's claims. On April 17, 1984, Detectives Lowe and Gonzales of the Tucson Police Department arrived at the Cochise County Jail. Upon arrival, Detective Martinez told Detectives Lowe and Gonzales that he had talked with Bravo and advised him of his Miranda rights, and that Bravo had told him a story. Detectives Lowe and Gonzales requested to speak with Bravo and Bravo was brought to the booking

area.[2] As Bravo entered the room, Detective Martinez introduced Bravo to the two detectives. The detectives indicated who they were and where they were from. Bravo indicated to the detectives that he shot a lady in a store near Tucson High because he felt trapped by the lady as he tried to rob her. Bravo stated that he stole the gun he used to kill the lady from a room in the Desert Inn.

At this point in the interview, Bravo, suffering from physical discomfort from the medication given him, indicated, "I don't wanna [sic] answer any more questions." The detectives, unsure whether Bravo's confession was genuine or the ramblings of a psychotic attention-seeker, and not convinced that

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2. The entire conversation between Bravo and the detectives was recorded. The recording was transcribed and is attached as Appendix F.

he wanted to terminate the questioning rather than just move off the particular subject under discussion, ignored Bravo's request and continued the interrogation. Thereafter, Bravo admitted his involvement in the Tinker robbery on the day prior to shooting the lady in the store. Bravo informed the police that Danny Champion helped him commit the Tinker robbery.

After the interview with Bravo, the Tucson police researched their old records and located a report of a theft of a gun from the Desert Inn. Upon further investigation, the Tucson Police Department secured bullets from the original owner of the gun, and compared them with slugs removed from Mr. Tinker and Ms. Wong. On May 2, 1984, Detective Lowe interviewed Danny Champion about his involvement in the Tinker robbery. Lowe informed Mr. Champion that he would not

be charged with that particular offense. Lowe indicated to Champion that he knew Champion was involved with Bravo in the robbery. Lowe also questioned Champion about the murder of Mrs. Wong. Champion denied any knowledge of the Wong homicide, but corroborated the facts as given by Bravo in his confession.

On May 16, 1984, Danny Champion's attorney contacted Detective Lowe and indicated that Champion had additional information about the Wong incident. Detective Lowe met with Danny Champion and his attorney at the county attorney's office. At the time of their meeting, Mr. Champion indicated that he thought it best to get what he knew "off his chest" and informed the detective that Bravo had told him that he had mistakenly shot Mrs. Wong when she cornered him.

On February 19, 1985, Bravo filed a motion to suppress all statements made by

him and any evidence obtained as a result of those statements. After an evidentiary hearing, the trial court made the following findings: the medication Haldol only placed Bravo in a "normal" condition; Bravo understood the meaning of his statements and was responsive and answered appropriately to the questions asked; and the side effects of the medication had no bearing on the confessions. The trial court held, however, that the statements made after Bravo indicated to Detectives Lowe and Gonzales that he did not wish to continue with the questioning were in violation of Miranda, and therefore suppressed those statements. The trial court refused to suppress the testimony of Danny Champion as the "fruit" of the Miranda violation.

Bravo appealed the trial court's rulings and argued that his statements made to the police were involuntary and

therefore in violation of the Fifth Amendment. State v. Bravo, supra, 762 P.2d at 1324, 17 Ariz.Adv.Rep. at 29-31. The Arizona Supreme Court rejected Bravo's contention. Id. Bravo likewise argued that the use of the testimony of Danny Champion, whose identity was learned by the police in violation of Miranda, was in violation of the Fifth Amendment and should have been suppressed. (Appendix D, Bravo's Opening Brief.) The state responded by arguing that the statements made by Bravo were voluntary under the Fifth Amendment, and that, if involuntary, the evidence derived from the statements need not be excluded under United States v. Ceccolini, 435 U.S. 268 (1978). (Appendix E, State's Answering Brief.) The state noted, however, that under Michigan v. Tucker, 417 U.S. 433 (1974), a Miranda violation did not warrant the

suppression of testimony from a live witness whose identity was derived from the violation. (Appendix E at E-28 n.5.) The Arizona Supreme Court held the statements were voluntary but found that, because Champion's identity was learned through a Miranda violation, Champion's testimony must be suppressed as a "fruit of the poisonous tree." State v. Bravo, supra, 762 P.2d at 1325-30, 17 Ariz.Adv.Rep. at 31-35. The state filed a motion for reconsideration asking the state supreme court to reconsider the applicability of the Wong Sun doctrine as it applies to Miranda violations. (Appendix B.) The court denied the state's motion. (Appendix C.)

REASONS FOR GRANTING THE WRIT

I. The "fruit of the poisonous tree" doctrine of Wong Sun does not apply to evidence derived from a Miranda violation.

In the Arizona Supreme Court's opinion, the court found the statements made by

Bravo to the police to be voluntary under the Fifth Amendment, but ordered the evidence derived from the statements after the Miranda violation to be suppressed. State v. Bravo, supra, 762 P.2d at 1330, 17 Ariz.Adv.Rep. at 38. The basis for the court's opinion was Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Ceccolini, 435 U.S. 268 (1978), and various other state and federal cases. Id. The state urged the Arizona Supreme Court to adopt the rationale of Michigan v. Tucker, 417 U.S. 433 (1974), and Oregon v. Elstad, 470 U.S. 298 (1985), and hold that evidence derived from Miranda violations is not subject to the "fruits" doctrine of Wong Sun unless an actual Fifth Amendment violation occurs. (Appendix B.) The Arizona Supreme Court declined. (Appendix C.) Petitioner believes the

Arizona Supreme Court was in error and prays for relief.

In Michigan v. Tucker, supra, this Court was asked to extend the "fruit of the poisonous tree" doctrine of Wong Sun v. United States, supra, to suppress the testimony of a witness for the prosecution whose identity was discovered as the result of a statement taken from the accused without the benefit of Miranda warnings. Michigan v. Tucker, supra, 417 U.S. at 446-47. This Court rejected the argument and held that, because there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in Wong Sun that fruits of a constitutional violation must be suppressed. Id., 417 U.S. at 451-52.

This Court affirmed the Michigan v. Tucker analysis in Oregon v. Elstad, 470 U.S. 298 (1985). The issue in Elstad was

whether a confession made after the police gave a suspect proper Miranda warnings was inadmissible on the grounds that the police had obtained a prior unwarned admission from the suspect. In considering the issue concerning the "fruit of the poisonous tree" doctrine of Wong Sun, this Court held that a violation of Miranda is not a violation of the Fifth Amendment itself. Id., 470 U.S. at 306-07. Rather, the Court noted that Miranda established a nonconstitutional prophylactic rule, the violation of which creates an irrebuttable presumption of coercion that is applicable in only a limited number of circumstances. Id.[3] When an unwarned

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3. For instance, while the presumption requires suppression of unwarned statements for purposes of the state's case-in-chief, the presumption does not bar introduction of the incriminating statements for impeachment purposes on cross-examination. See Harris v. New York, 401 U.S. 222 (1971).

statement is used in situations where the presumption does not apply, "the primary criterion of admissibility [remains] the 'old' due process voluntary test." Id., 470 U.S. at 307-08 (citations and quotations omitted). Based on the foregoing, and relying heavily on Michigan v. Tucker, supra, this Court held that, when there is no actual infringement of a suspect's constitutional rights, Miranda violations do not require the exclusion of derivative evidence. Id.

In dicta, this Court stated that this principle applies regardless of whether the alleged fruit of the Miranda violation is a witness, article of evidence, or the accused's own voluntary testimony. Id., 470 U.S. at 308. Courts that have been asked to suppress derivative evidence based on Miranda violations after Elstad have relied on

the dicta in Elstad that the exclusionary rule does not apply to such evidence and refused to extend Wong Sun. United States v. Sangineto-Miranda, Nos. 87-5667, 87-5668, 87-5711, 87-5712 (6th Cir., Oct. 27, 1988); United States v. Bengivenga, 845 F.2d 593 (5th Cir.), cert. denied, 57 U.S.L.W. 3312 (1988); United States v. Johnson, 816 F.2d 918 (3d Cir. 1987); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), cert. denied, 479 U.S. 909 (1986); United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985); State v. Wethered, 110 Wash.2d 466, 755 P.2d 797 (1988); Bush v. State, 523 So.2d 538 (Ala.Ct.Crim.Apps. 1988); In re Owen F, 70 Md.App. 672, 523 A.2d 627 (Ct.Spec.App. 1987); State v. Dellorfana, 128 N.H. 628, 517 A.2d 1163 (1986).

In Martin v. Wainwright, supra, the court was faced with a situation where the police failed to honor the suspect's

request to "cut off" questioning. Id., 770 F.2d at 928. The court held that the statements made after the request were in violation of Miranda and suppressed the statements. Id., 770 F.2d at 924. In addressing the Wong Sun question, the court noted that Elstad and Tucker involved a failure to give Miranda warnings, not the failure to honor a suspect's right to terminate questioning. Id., 770 F.2d at 928. The court held, however, that the same reasoning necessarily applied under either scenario. Id. The court found that the suppressed portion of the statement was "voluntary" and not in violation of the Fifth Amendment and, therefore, the derivative evidence from the Miranda violation was not subject to the exclusionary rule. Id., 770 F.2d at 925, 928.

Petitioner asserts that the reasoning and analysis of the court in Martin v. Wainwright should control the instant case. While the admission of evidence that is derived from a Miranda violation may marginally reduce the incentives to administer and comply with Miranda's prophylactic warnings, "[t]he arguable benefits from excluding such [evidence] by way of possibly deterring police conduct that might compel admissions are . . . far outweighed by the advantages of having relevant and probative [evidence], not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth." Michigan v. Tucker, supra, 417 U.S. at 462 (White, J., concurring). Whereas the goal of the Fourth Amendment's exclusionary rule is to deter unlawful police conduct, Oregon v. Elstad, supra, 470 U.S. at 306, the goal of the Fifth Amendment's

exclusionary rule is to assure trustworthy evidence. Michigan v. Tucker, supra, 417 U.S. at 448; United States v. Washington, 431 U.S. 181, 187-88 (1977). In the vast majority of cases, as in the instant case, there is plainly no reason to believe that the evidence derived from voluntary, but Miranda violative statements is untrustworthy. Furthermore, as this Court noted in Elstad, society cannot expect police to act without error. Oregon v. Elstad, 470 U.S. at 309. This Court stated, "If errors are made by law enforcement officers in administering Miranda procedures, they should not breed the same irremedial consequences as police infringement of the Fifth Amendment itself." Id.

When police fail to comply with the dictates of Miranda and its progeny, the admissibility of evidence derived from

the statements made in violation of Miranda should turn on whether the statements are voluntary within the meaning of the Fifth Amendment. Therefore, the Arizona Supreme Court's application of Wong Sun to a Miranda violation is in error.

II. The "free will" of the live witness attenuated the illegal action of the police in violating Bravo's Miranda rights, thereby negating the need for the suppression of the derivative evidence.

Furthermore, the Arizona Supreme Court erred in its application of the exclusionary rule by summarily imposing the rule without balancing the societal costs of excluding the evidence against the need to enforce Miranda principles. United States v. Ceccolini, supra. In United States v. Ceccolini, supra, this Court held that, in applying the poisonous tree doctrine to live-witness testimony in the context of a

constitutional violation, the courts should consider (1) the length of the road between the illegal action and the testimony of the witness at trial, (2) the degree of free will exercised by the witness, and (3) the fact that the exclusion of the witness' testimony "would perpetually disable a witness from testifying about relevant and material facts." United States v. Ceccolini, supra, 435 U.S. at 273-78; United States v. Hooton, 662 F.2d 628, 632 (9th Cir. 1981), cert. denied, 455 U.S. 1004 (1982). The court in Hooton stated that, when police misconduct does not induce the witness' cooperation, the testimony will not be suppressed even though the illegal activity was one step in a series of events that led to the witness testifying. United States v. Hooton, supra; United States v. Leonardi, 623 F.2d 746, 752 (2d Cir.), cert. denied,

447 U.S. 928 (1980). In determining when police misconduct encroaches on the witness' free will under the Ceccolini test, the court in Hooton stated it would consider: (1) the willingness of the witness to testify; (2) the role played by the illegally-obtained evidence in gaining the witness' cooperation; (3) the proximity between the illegal behavior, the witness' decision to cooperate and the actual testimony at trial; and (4) the police motivation in engaging in the improper conduct. United States v. Hooton, supra. As such factors are factual in nature, deference should be given to the trial court's findings.

In this case, the trial court made factual findings regarding each issue concerning the witness' free will, as set forth in United States v. Hooton, supra. (See Appendix B at B-13 through B-19.) The trial court then balanced the

findings and concluded that under Ceccolini, the costs of exclusion outweighed its benefit and denied the motion to suppress. On appeal, the Arizona Supreme Court reviewed the Hooton factors found by the trial court but dispensed with balancing the costs to society as required by Ceccolini and merely stated that such evidence should be excluded. Clearly, justice is not served by the short shrift the Arizona Supreme Court gave such an analysis.

As stated by this Court, "[A] living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized . . . . [T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." United States v. Ceccolini, 435 U.S. 268, 277 (1978), quoting from Smith

v. United States, 117 U.S.App.D.C. 1, 3-4, 324 F.2d 879, 881-82 (1963), cert. denied, 377 U.S. 954 (1964). The Arizona Supreme Court's mechanical application of the Hooton "free will" test, without balancing the societal costs, fails to take into consideration the very concept that makes the suppressing of live witnesses unique under the exclusionary rule. Live witnesses should not be suppressed unless the state's violation of the accused's constitutional rights coerces the witness into testifying. United States v. Hooton, supra. No such coercion existed in this case.

CONCLUSION

The State of Arizona prays this Court will accept the petition for writ of certiorari and apply the holding of Oregon v. Elstad and Michigan v. Tucker and find that the "fruit of the poisonous

tree" doctrine of Wong Sun does not apply to those cases where the police failed to honor a Miranda invocation and thereafter derived evidence from the statements given. Likewise, this Court should find that the "free will" of a live witness attenuates a Miranda violation, thereby precluding the application of the exclusionary rule to witnesses discovered from statements obtained in violation of Miranda.

DATED this 6th day of January, 1989.

Respectfully submitted,

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

CRANE McCLENNEN, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon George Haskel Curtis, Curtis and Cunningham, 5610 East 22nd Street, Tucson, Arizona, 85711, Attorney for Alexsandro Vincente Bravo, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States

Mail, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

DATED this 6th day of January, 1989.

CRANE McCLENNEN
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SUBSCRIBED AND SWORN to before me this 6th day of January, 1989.

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

CRM86-0274
8188d jd (PJM)